LE COPY

JUL 1954

HAROLD B. WILLEY, Cle

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 125.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

GEORGE D. BURROUGHS,
Bank of Edwardsville Building,
Edwardsville, Illinois,

FRED P. SCHUMAN,
1308a Niedringhaus Avenue,
Granite City, Illinois,

GORDON BURROUGHS,
Bank of Edwardsville Building,
Edwardsville, Illinois,

BURROUGHS, SIMPSON & BURROUGHS,
Bank of Edwardsville Building,
Edwardsville, Illinois,

Attorneys for Respondent.

HAROLD G. TALLEY,
214a West Third Street,
Alton, Illinois,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

BLEED THROUGH POOR COPY

INDEX.

Page

Subject Index.

Opinions below 1

Jurisdiction 2

Questions presented 2

Statutes involved 3

Reasons relied on for denial of writ 5

Statement 6

Summary of argument 9

Argument 10

Conclusion 21

I.

The Appellate Court had the power to remand the case at bar for new trial under the settled Illinois law governing this cause 10

II.

New trial rules in Federal Courts 13

A. Power and duty of Federal Trial Judge 13

B. Power and duty of Federal reviewing court ... 16

III.

Federal rule and Illinois rule are same 23

IV.

This Court should not review the findings of fact made by Appellate Court 25

Table of Cases.

Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 122 F. 2d 350 ..... 10, 13
Camp v. Atlantic Coast Line R. Co. (Alabama), 36 So. (2d) 331 6
Charles v. Norfolk & Western Ry. Co., 7 Cir., 188 F. 2d 691, certiorari denied 342 U. S. 831 13
Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472.. 26
Chrisman v. Miller, 197 U. S. 313 26
Commercial Credit Co. v. Pepper, 5 Cir., 166 F. 2d 71.. 18
Corcoran v. City of Chicago, 373 Ill. 567, 27 N. E. (2d) 451 ..... 11, 12, 16
Couch v. Southern Ry. Co., 4th Dist., 294 Ill. App. 490, 14 N. E. (2d) 266 24
Daffinrud v. United States, 7 Cir., 145 F. 2d 724 13
Dice v. Akron, C. & Y. R. Co., 342 U. S. 359 12
Ehalt v. McCarthy (Utah), 138 P. (2d) 639 6
Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474 22
Fine v. Paramount Pictures, 7 Cir., 181 F. 2d 300 22
Fryer v. St. L. & S. F. Ry. Co., 333 Mo. 740, 63 S. W. (2d) 47 6
Gasoline Products Co. v. Champion Refining Co., 283 U. S. 494 23
General Accident Fire & Life Assur. Corp. v. Dickinson, 61 F. Supp. 153 13
Grand Trunk Western Ry. Co. v. Heattie, 6 Cir., 48 F. (2d) 759 19
Harlan v. Wabash Ry. Co., 335 Mo. 414, 73 S. W. (2d) 749 6
Jennings v. Murphy, 7 Cir., 194 F. 2d 35..... 23
Kaufmann v. Atlantic Greyhound Corp., 41 F. Supp. 252 ..... 10, 13
Lynch v. Delaware, L. & W. R. Co., 2 Cir., 58 F. (2d) 177 6

BLEED THROUGH POOR COPY

Mabee v. Sutliff & Case Co., 404 Ill. 27, 88 N. E. (2d) 769 ..... 12, 26
Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211 ..... 12, 24
Mitchell v. L. & N. R. R. Co., 375 Ill. 545, 31 N. E. (2d) 965 11
Norfolk S. R. Co. v. Ferrebee, 238 U. S. 269 22
Ogdon v. Gianakos, 415 Ill. 591, 114 N. E. (2d) 686 10
Olson v. Chicago Transit Authority, 1 Ill. 2d 83, 115 N. E. (2d) 301 ..... 16, 26
Parthun v. Elgin, J. & E. Ry. Co. (1st-1945), 325 Ill. App. 408, 60 N. E. (2d) 464, appeal denied, 326 Ill. App. xv 10, 24
Patton v. Baltimore & O. R. Co., 3 Cir., 197 F. 2d 732 22
Pryor v. Chicago, R. I. & P. Ry. Co., 170 Okla. 158, 39 P. (2d) 563 6
Riley v. Wabash Ry. Co., 328 Mo. 910, 44 S. W. (2d) 136 6
Stanczak v. Pa. Ry. Co., 7 Cir., 174 F. 2d 302 19
Virginian Ry. Co. v. Armentrout, 4 Cir., 166 F. 2d 400 16
Wilkerson v. McCarthy, 336 U. S. 53 ..... 23, 26
Williams v. New York Central R. R., 402 Ill. 494, 84 N. E. (2d) 399 19
Witherbee v. Elgin, J. & E. Ry. Co., 7 Cir., 191 F. 2d 302 19
Zachritz v. St. L. & S. F. Ry. Co., 336 Mo. 801, 81 S. W. (2d) 608, certiorari denied 296 U. S. 584 6

Statutes Cited.

45 U. S. C. A., Secs. 1-16 2
45 U. S. C. A., Secs. 22-34 ..... 2, 3, 6
45 U. S. C. A., Secs. 51-59 ..... 2, 19, 24
Ill. Rev. Stat. 1953, ch. 110, Par. 199 (2) (c) 3, 5-6
Ill. Rev. Stat. 1953, ch. 110, Par. 216 (3) (b) 2, 4, 9, 12, 25
Rule 35, Fed. Rules Civ. Proc. 25
Rule 59, Fed. Rules Civ. Proc. 5, 13
Rule 38, par. 5 (a), United States Supreme Court 26

BLEED THROUGH POOR COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 125.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Appellate Court of Illinois, Fourth District, is reported at 351 Ill. App. 272, 114 N. E. (2d) 901. The Supreme Court of Illinois denied Leave to Appeal without written opinion (R. 154).

JURISDICTION.

Petitioner predicates his claimed cause of action and right of recovery herein solely upon the Federal Boiler Inspection Act of 1924 (45 U. S. C. A., Secs. 22-34), for his Complaint (R. 39-43), pleads only Section 2 of said Boiler Inspection Act, and Petitioner is in error in indicating to this Court (His Pet. 2, 3, 4, 11, 12, 19) that the case at bar is brought under the "Safety Appliance Act" of 1893 (45 U. S. C. A., Secs. 1-16). The Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59) is not now pleaded herein and is not in issue in this cause, petitioner having dismissed Count II of his Complaint, predicated upon said Act, prior to the selection of the jury in this cause (R. 5).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a State Appellate Court, reviewing a Federal Boiler Inspection Act case, has the power and duty to reverse the judgment therein and to remand the cause for a new trial where it finds that the verdict of the jury in such cause is against the manfiest or clear weight of the evidence?

2. Whether this Court can properly re-examine and pass upon the findings of fact of the Illinois Appellate Court in this cause in view of the provisions of Section 92 (3) (b) of the Illinois Civil Practice Act* [Ill. Rev. Stat. 1953, ch. 110, Par. 216 (3) (b)] limiting review by the Illinois Supreme Court on appeal of law actions from such Appellate Court "to questions of law only."

---

* See page 4 of this Brief for quotation of this statute.

BLEED THROUGH POOR COPY

STATUTES INVOLVED.

Federal.

45 U. S. C. A., Sec. 23—Section 2, Federal Boiler Inspection Act:

> "Use of unsafe locomotives and appurtenances unlawful; inspection and tests.
>
> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c. 103, §2, 36 Stat. 913; Mar. 4, 1915, c. 169, §1, 38 Stat. 1192; June 7, 1924, c. 355, §2, 43 Stat. 659."

State.

Ill. Rev. Stat. 1953, ch. 110, par. 199 (2) (c)—[Section 75 (2) (c) Illinois Civil Practice Act], in pertinent part, is as follows:

> "In any case heard and determined in the trial court upon actual trial in which the Appellate Court upon appeal from the final judgment or decree entered in the cause in the trial court reverses said judgment or decree and remands the cause for a new trial or

hearing, and in which the party in whose favor the trial court's judgment or decree was rendered shall present to and file with the Appellate Court an affidavit stating that he will be unable on a future trial or hearing to adduce other or additional evidence, facts or circumstances that were adduced in the trial court and expressly waiving the right to a new trial or hearing and consenting and requesting that the portion of the judgment of the Appellate Court remanding the cause for new trial or hearing be deleted and stricken from the judgment of the Appellate Court, then that court upon motion shall amend its judgment by striking out the portion thereof remanding the cause for new trial or hearing. Thereupon it shall be competent for the Supreme Court to grant leave to appeal from said final judgment of reversal for its review and determination with the same power and authority in the case, and with like effect, as in other cases in which leave to appeal from the final judgments of the Appellate Courts is authorized in this section."

Ill. Rev. Stat. 1953, ch. 110, par. 216 (3) (b)—[Section 92 (3) (b) Illinois Civil Practice Act], in pertinent part, is as follows:

"Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case: Provided, that, except as to equitable issues, the Supreme Court shall re-examine cases brought to it by appeal from the Appellate Courts, as to questions of law only. As amended by act approved July 2, 1947. L. 1947, p. 1349."

BLEED THROUGH POOR COPY

REASONS RELIED ON FOR DENIAL OF WRIT.

1. The settled Federal and Illinois Rules are that the granting of a new trial is a matter of procedure only and such Federal rule was recognized and sanctioned by this Court in its promulgating of Rule 59, Fed. Rules Civ. Proc., providing for the granting of new trials "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."

2. The Illinois rule is that the Appellate Court has the power and duty to remand a law cause for new trial if it finds that the verdict of the jury is against the manifest weight of the evidence.

3. The Federal Rule is (a) that the Federal trial judge in a law action has the duty and power to award a new trial where the verdict of the jury is contrary to the clear weight of the evidence, even though there may be substantial evidence which would prevent the direction of a verdict, and the exercise of such duty and power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right; and (b) that a Federal reviewing court has the power and duty to reverse a Federal trial court and remand for a new trial where the failure of such trial court to award a new trial amounts to an abuse of discretion, as where the verdict of the jury is against the clear (or manifest) weight of the evidence.

4. The Federal Rule and the Illinois Rule governing appellate review of orders granting or refusing new trials are the same.

5. The petitioner in this cause, by his own affirmative act, admitted the procedural law of Illinois applied when he, pursuant to Section 75 (2) (c) of the Illinois Civil

Practice Act* [Ill. Rev. Stat. 1953, ch. 110, par. 199 (2) (c)], caused the Appellate Court to strike out the portion of its judgment herein remanding this cause for a new trial (R. 150).

ADDITIONAL STATEMENT OF THE CASE.

The Petitioner, having predicated his right of recovery herein solely upon a claimed violation of Section 2 of the Federal Boiler Inspection Act of 1924 (45 U. S. C. A., Sec. 23), had the burden of proving that the trolley retriever was defective and that such defect was the proximate cause of his injury [**Zachritz v. St. L. & S. F. Ry. Co.** (1935), 336 Mo. 801, 806-807, 81 S. W. (2d) 608, 611, certiorari denied (1935), 296 U. S. 584, 58 S. Ct. 95, 80 L. Ed. 413; **Fryer v. St. L. & S. F. Ry. Co.** (1933), 333 Mo. 740, 749-758, 63 S. W. (2d) 47, 50-55; **Riley v. Wabash Ry. Co.** (1931), 328 Mo. 910, 917-923, 44 S. W. (2d) 136, 138-141; **Harlan v. Wabash Ry. Co.** (1934), 335 Mo. 414, 422, 423, 73 S. W. (2d) 749, 752, 753; **Pryor v. Chicago, R. I. & P. Ry. Co.** (1934), 170 Okla. 158, 162-165, 39 P. (2d) 563, 568-571; **Lynch v. Delaware, L. & W. R. Co.**, 2 Cir. (1935), 58 F. (2d) 177; **Ehalt v. McCarthy** (Utah, 1943), 138 P. (2d) 639, 642-646; **Camp v. Atlantic Coast Line R. Co.** (Alabama, 1948), 36 So. (2d) 331, 335].

The facts in the case at bar appear in the opinion of the Appellate Court (351 Ill. A. 272, 114 N. E. [2d] 901) and will be here quoted only as they relate to a defect in such retriever.

The Appellate Court, in passing upon defendant's motions for judgment n. o. v. and for a new trial, first found that (p. 277 of 351 Ill. A.) "Plaintiff's evidence does not include any affirmative, specific evidence of a defect in the retriever in question," but then found that (p. 278 of 351

---

* See page 3 of this Brief for quotation of this statute.

BLEED THROUGH POOR COPY

Ill. A.) "plaintiff's evidence taken as true has sufficient probative force to require the issues to be submitted to a jury. Robson v. Pennsylvania R. Co., 337 Ill. App. 557, 86 N. E. (2d) 403," and thus ruled against defendant upon its motion for judgment n. o. v.

However, in passing upon defendant's motion for new trial, the Appellate Court said:

> pp. 278-279—"Defendant further contends that the verdict of the jury finding a violation of the Boiler Inspection Act is contrary to the manifest weight of the evidence. In general, it may be said that plaintiff's evidence of injury resulting from the allegedly defective retriever was contradicted in many particulars, but these contradictions went to the point of plaintiff's credibility and were resolved by the jury in his favor. However, with respect to the existence of the alleged defect, certain undisputed facts were established by the evidence. Plaintiff himself testified that before the run back to Alton was started, he saw the motorman set the pole that plaintiff had left in the retrieved position under the hook on top of the car, and that he presumed the retriever was reset at that time. *(See: R. 74, 75.) Further, on cross-examination of the mechanical engineer who gave opinion evidence on plaintiff's behalf as to possible defects in the retriever which would cause it to retrieve unexpectedly, it was stated that these same defects would prevent the retriever from oprating normally at all. *(See: R. 85.) Yet the evidence shows that the retriever operated normally before and after the incident complained of. In order for the retriever to have retrieved the trolley pole when it jumped the line going to the depot, it must have been in good working order; again, when the motorman

* Refers to pages of Record in this Court.

reset the retriever and placed the pole on the hook before the return trip to Alton, the retriever operated normally. These facts, to be gathered from plaintiff's evidence, in our view, appear more favorable to the defendant than to the plaintiff. The evidence further showed that what happened to plaintiff on this occasion had happened to him and to others from time to time without the retriever having been defective. The burden rested on plaintiff to show that on this occasion a defect existed and that it proximately caused his injury. With respect to the alleged defect, it is clear from all the evidence that this burden of proof was not satisfied. The inference of a defect arising from plaintiff's circumstantial evidence is manifestly outweighed by the showing that the retriever worked normally before and after the incident and by the other evidence in the record. It is, therefore, our conclusion from all the evidence that the jury finding of a violation of the Boiler Inspection Act is clearly against the manifest weight of the evidence. Robertson v. Louisville & N. R. Co., 327 Ill. App. 44, 63 N. E. (2d) 608."

and thus ruled in favor of defendant upon its motion for new trial.

The right and power of the Appellate Court to so rule is, we believe, the only question properly presented to this Court.

SUMMARY OF ARGUMENT.

The case at bar primarily presents this simple question: Does a State Appellate Court, reviewing a Federal Boiler Inspection Act case, have the power and duty to reverse the judgment therein and to remand the cause for a new trial where it finds that the verdict of the jury in such cause is against the manifest or clear weight of the evidence?

It is settled law in Illinois that State courts of review do have such power and duty and the Appellate Court herein correctly applied such Illinois rule of law in deciding the case at bar and the Illinois Supreme Court properly followed such rule of law in denying Leave to Appeal herein.

It is also settled Federal law that Federal Courts of review likewise have such power and duty; and that the Illinois rule and the Federal rule are the same.

It follows then that under either or both rules this Court should deny certiorari in this cause.

The secondary question presented in this cause is: Does this Court have the right to review the facts in this cause in view of the provisions of Section 92 (3) (b) of the Illinois Civil Practice Act *[Ill. Rev. Stat. 1953, ch. 110, par. 216 (3) (b)], which make the findings of fact of the Appellate Court on the weight of the evidence final and binding on the Illinois Supreme Court? The answer to this question is, we believe, no.

---

* See page 4 of this Brief for quotation of this statute.

ARGUMENT.

Before citing and discussing the Illinois and Federal authorities and rules governing appellate review of judgments and orders granting and refusing new trials it is to be noted that under Illinois law (**Ogdon v. Gianakos**, 415 Ill. 591, 595, 596, 114 N. E. (2d) 686; **Parthun v. Elgin, J. & E. Ry. Co.** (1st, 1945), 325 Ill. App. 408, 411, 60 N. E. (2d) 464, **appeal denied**, 326 Ill. App. xv) and under Federal law (**Aetna Casualty & Surety Co. v. Yeatts**, 4 Cir., 1941, 122 F. 2d 350, 352; **Kaufman v. Atlantic Greyhound Corp.**, D. C. S. D. W. Va., 1941, 41 F. Supp. 252, 254) the granting or refusing of a new trial is a matter of procedure and the last-cited Federal cases also squarely hold that Federal courts are not in any way subject to the rules of state practice governing new trials.

I.

The Appellate Court Had the Power to Remand the Case at Bar for New Trial Under the Settled Illinois Law Governing This Cause.

The Illinois Supreme Court has heretofore, in effect, ruled on the point under discussion by its denial of leave to appeal, 326 Ill. A. xv, in the case of **Parthun v. Elgin, J. & E. Ry. Co.** (1945), 325 Ill. A. 408, 60 N. E. (2d) 464, wherein the First District Appellate Court, in squarely holding that it had the right, **under the governing state practice**, to grant a new trial in a F. E. L. A. case, said:

> p. 411—"Defendant contends here that the verdict is excessive, and against the manifest weight of the evidence. Plaintiff claims that this court is bound by the decisions of the Federal Courts in cases of this kind and has no authority to weigh the evidence. Under Section 56 of the F. E. L. Act, plaintiff had the

right to sue in a Federal District Court or in a State Court. Miles v. Ill. Cen. R. R. Co., 315 U. S. 698. **Having chosen courts of this State, he must prosecute his action in accordance with our modes of procedure** (Minn. & St. Louis R. R. Co. v. Bombolis, 241 U. S. 211), and we have authority to weigh the evidence to determine whether the verdict should stand or whether it should be set aside and the cause retried. [Chap. 110, Par. 216, Sub-par. (3) b, Ill. Rev. Stats. (Jones Ill. Stats. Ann., 104,092, subpar. (3) b); Corcoran v. City of Chicago, 373 Ill 567; and Mitchell v. L. & N. R. R. Co., 375 Ill. 545.] **In Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, relied upon by plaintiff, suit was filed in a Federal District Court and the case is, therefore, not applicable.**" (Emphasis supplied.)

In the cited case of **Mitchell v. L. & N. R. R. Co.**, 375 Ill. 545, 31 N. E. (2d) 965, the Illinois Supreme Court, in instructing the Fourth District Appellate Court as to the procedure it should follow in remanding F. E. L. A. cases for new trial, said:

> p. 551—"The Appellate Court has reversed the judgment of the trial court without remanding. Where there is any evidence to support the Plaintiff's cause of action the Appellate Court should not enter such a judgment, but if it finds that the judgment of the trial court is manifestly against the weight of the evidence it should reverse and remand for a new trial. The judgment of the Appellate Court is, therefore, reversed and the cause is remanded to that court, with directions to consider the weight of the evidence and to consider any other errors relied upon for a reversal.
>
> "Reversed and remanded, with directions."

In the cited case of **Corcoran v. City of Chicago**, 373 Ill. 567, 27 N. E. (2d) 451, such Court sustained the constitu-

tionality of said Section 92 (3b) of the Civil Practice Act* (Ill. Rev. Stat. 1951, ch. 110, par. 216) and held that such section did not deprive a plaintiff of the right to a jury trial in a case where a verdict for the plaintiff is set aside and the remanding order is stricken on the plaintiff's motion (as was done in the case at bar) because he is unable to produce any further evidence on another trial. And in **Mabee v. Sutliff & Case,** 404 Ill. 27, 88 N. E. (2d) 769, such court followed the **Corcoran** case, supra, 373 Ill. 567, 27 N. E. (2d) 451, in holding that the Appellate Court is authorized to determine whether the verdict is against the weight of the evidence and that the facts found by the Appellate Court are binding upon such Supreme Court.

This Court does not require our aid in interpreting and applying its holding in **Minneapolis & St. L. R. Co. v. Bombolis,** 241 U. S. 211, 60 L. ed. 961, 36 S. Ct. 595, decided without dissent in 1916, and thoroughly reviewed in 1952, in the concurring opinion rendered in **Dice v. Akron, C. & Y. R. Co.,** 342 U. S. 359, 96 L. ed. 398, 72 S. Ct. 312.

We do submit that the **Bombolis** case, supra, confirms our position that the case at bar is governed by Illinois "new trial" law.

It is here to be noted that petitioner solely by his own affirmative act, in causing the Appellate Court to strike out the portion of its judgment herein remanding this cause for a new trial (R. 150), has admitted that the procedural law of Illinois applied and is bound thereby.

---

* See page 4 of this Brief for quotation of this statute.

II.

New Trial Rules in Federal Courts.

A. Power and Duty of Federal Trial Judge.

Rule 59, Fed. Rules Civ. Proc., provides that Federal Trial Courts may grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."

The Federal Courts have consistently and uniformly held (**Charles v. Norfolk & Western Ry. Co.**, 7 Cir., 1951, 188 F. 2d 691, 695, certiorari denied 342 U. S. 831, 72 S. Ct. 55, 96 L. Ed. 628; **Daffinrud v. United States**, 7 Cir., 1944, 145 F. 2d 724, 725; **Aetna Casualty Co. v. Yeatts**, 4 Cir., 1941, 122 F. 2d 350, 352-354; **General Accident, Fire & Life Assur. Corp. v. Dickinson**, D. C. N. D. Cal., N. D., 1945, 61 F. Supp. 153, 156; **Kaufman v. Atlantic Greyhound Corp.**, D. C. S. D. W. Va., 1941, 41 F. Supp. 252, 254) that Rule 59 makes it the duty of the Federal Trial Judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, even though there may be substantial evidence which would prevent the direction of a verdict.

The above-cited case of **Aetna Casualty & Surety Co. v. Yeatts**, 4 Cir., 1941, 122 F. 2d 350, is apparently the leading Federal case on the power and duty of the Federal Court Trial Judge to grant a new trial where the verdict of the jury is against the clear weight of the evidence. For this reason and the further reason that the Petition for a Writ of Certiorari filed herein cites and argues "directed verdict" law instead of "new trial" law, we will quote the following from this most pertinent decision:

> pp. 352-353—"The motion to set aside the verdict and grant a new trial was a matter of federal procedure,

governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice. On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right. Smith v. Times Pub. Co., 178 Pa. 481, 36 A. 296, 35 L. R. A. 819; Bright v. Eynon, 1 Burr. 390; Mellin v. Taylor, 3 B. N. C. 109, 132 Eng. Reports 351. The matter was well put by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in Smith v. Times Publishing Co., supra (178 Pa. 481, 36 A. 298), as follows: 'The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice—a power exercised in pursuance of a sound judicial discretion, **without which the jury system would be a capricious and intolerable tyranny,** which no people could long endure. This court has had occasion more than once recently to say that it was **a power the courts ought to exercise unflinchingly.**' (Emphasis supplied.)"

The court then exhaustively reviewed the authorities, tracing the history of the above power back to 1665 and to the Magna Charta, and then said:

BLEED THROUGH POOR COPY

p. 354—"To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require.

"The distinction between the rules to be followed in granting a new trial and directing a verdict were stated by us with some care in Garrison v. United States, 4 Cir., 62 F. 2d 41, 42, from which we quoted with approval in the later case of Roedegir v. Phillips, 4 Cir., 85 F. 2d 995, 996, as follows: 'Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, **set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence**, or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice. See Felton v. Spiro (6 Cir.), 78 F. 576. Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is. Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720. **Verdict may be set aside and new trial granted, when the verdict is contrary to the clear**

weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice.' . . ." (Emphasis supplied.)

(See: **Corcoran v. City of Chicago,** 373 Ill. 567, 571-580, for review of common law right of appellate courts to remand for new trial where verdict of jury was against manifest weight of evidence. **Followed** and reaffirmed **Olson v. Chicago Transit Authority** (1953), 1 Ill. 2d 83, 85, 86.)

B. **Power and Duty of Federal Reviewing Court.**

The foregoing authorities conclusively establish the principle of law that a Federal Court trial judge has the power and **absolute duty** to award a new trial where the verdict of the jury is against the clear weight of the evidence, as the Appellate Court has found to be the case in this cause (351 Ill. A. 283, 114 N. E. [2d] 898).

The next question, presented is: Does a Federal Reviewing Court have the power to reverse and remand for a new trial where such Federal Court trial judge has failed and refused to perform his absolute duty to grant a new trial?

This question was answered in the affirmative by the Fourth Circuit Court of Appeals in the case of **Virginian Ry. Co. v. Armentrout** (1948), 166 F. 2d 400. In that case such court, speaking through Judge Parker, first pointed out that this was the second appeal (p. 401) "in the distressing case of the infant whose hands and portions of whose arms were cut off by a backing locomotive" and that in the first appeal it had awarded a new trial (p. 401) "for errors in the charge of the court." (See 158 F. 2d 358.)

BLEED THROUGH POOR COPY

The court then discussed the facts to show that an award of $160,000 to a child who was 13 months old at the time of injury was excessive, reviewed (p. 408) the authorities on the well-established power and duty of the trial judge to grant a new trial and then said:

pp. 408-409—"The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear. It is true that under Section 22 of the Judiciary Act of 1789, 28 U. S. C. A. #879, there may be no reversal on writ of error for any error in fact; and this rule has been frequently applied where reversal is sought because damages are excessive or inadequate. Fairmont Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439. We do not understand the rule to have application, however, **in those exceptional circumstances where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion.** In a situation of that sort, **reversal is no more based on 'error in fact' than reversal for refusal to direct a verdict for insufficiency of evidence.** Whether there has been an abuse of discretion **is a question of law in the one case, just as is the legal sufficiency of the evidence in the other.** An Appellate court **is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion.** . . ." (Emphasis supplied.)

"That abuse of discretion in refusing to set aside a verdict is an exception to the rule that the granting or refusing of a new trial is not assignable as error, is definitely recognized in the following decisions: Detroit Transfer Co. v. Pratt, 6 Cir., 2 F. 2d 193; Carter Coal Co. v. Nelson, 4 Cir., 91 F. 2d 651, 654; Western Union Tel. Co. v. Dismang, 10 Cir., 106 F. 2d

362, 364; Southern Fruit Distributors v. Fulmer, 4 Cir., 107 F. 2d 456, 459. In the case of Carter Coal Co. v. Nelson, supra (91 F. 2d 654), this court, speaking through Judge Soper, said: 'The established rule in the federal appellate courts is that they have no power to review the action of a trial court in granting or denying a motion for a new trial for error of fact. Such a matter lies wholly within the discretion of the trial court and **it is only when there is an abuse of such discretion that its action is reviewable.**' (Emphasis supplied.)" . . .

"For the reasons stated, the judgment appealed from will be reversed and the cause will be remanded for a new trial."

In **Commercial Credit Corp. v. Pepper** (1951), 187 F. 2d 71, the Fifth Circuit Court of Appeals followed the **Virginian Ry. Co.** case, supra, 166 F. 2d 400, in reversing and remanding for a new trial, and in the course of its opinion said:

pp. 75-76—"Under the circumstances presented, and quite independent of the error in the charge, we are of opinion that the trial court erred in denying plaintiff's motion for a new trial. It is a principle well recognized in the federal courts that the granting or refusing of a new trial is a matter resting within the discretion of the trial court. The term 'discretion,' however, when invoked as a guide to judicial action, means a sound discretion, exercised with regard to what is right and in the interest of justice. And an appellate court is not bound to stay its hand and place its stamp of approval on a case when it feels that injustice may result. Quite to the contrary, it is definitely recognized in numerous decisions that an abuse of discretion is an exception to the rule that the granting or refusing of a new trial is not assignable as error.

BLEED THROUGH POOR COPY

"Upon the record before us, we hold that it was an abuse of discretion to deny plaintiff's motion for a new trial."

Even some of the authorities cited and quoted by the Petitioner in his Petition in this Court support the power of the Court of Appeals to remand for a new trial, for in the cited case (Pet. 14) of **Witherbee v. Elgin, Joliet & Eastern Ry. Co.** (1951), 191 F. 2d 302, the Seventh Circuit Court of Appeals remanded a F. E. L. A. case for a new trial, and in the cited case (Pet. 14) of **Stanczak v. Pa. Ry. Co.** (1949), 174 F. 2d 302, the same Court refused to grant a new trial in a F. E. L. A. and Safety Appliance Act case because there was no abuse of discretion by the Federal Trial Judge. And in the cited case (Pet. 14, 16) of **Grand Trunk Western Ry. Co. v. Heattie** (1931), 48 F. 2d 759, the Sixth Circuit Court of Appeals also denied a new trial because there was no abuse of discretion. Furthermore, in the cited case (Pet. 12, 14) of **Williams v. New York Central R. R.**, 402 Ill. 494, 84 N. E. (2d) 399, a suit under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, et seq.) and the Federal Safety Appliance Act (45 U. S. C. A., Secs. 1-16), the Illinois Supreme Court reviewed and cited (pp. 500-508) the decisions of this Court relied on by petitioner herein, in reaching the conclusion that the First District Appellate Court had erroneously entered a directed verdict judgment in favor of the defendant railroad, and then said:

p. 508—"From a careful analysis of the evidence considered in this case in connection with the rules and principles as announced under the Federal Employers' Liability Act, and the decisions pertaining thereto, we are of the opinion it cannot be said as a matter of law, that the verdict of the jury is without support in the evidence. We are not intimating in any way how the court should decide the factual

matters in this record other than to say the Appellate Court should apply the facts to each charge of negligence under the rules as we have above pointed out, *and make its determination accordingly.*

"The judgment, therefore, of the Appellate Court is reversed and the cause remanded to that Court, with directions to consider the assignment of errors other than the one decided, and to either affirm the judgment of the trial court, **or reverse it and remand the cause for a new trial.** Reversed and remanded, with directions." (Emphasis supplied.)

It is here to be noted that in its infrequent "Supplement to Opinion on Denial of Petition for Rehearing," the Appellate Court said (pp. 282-283 of 351 Ill. App.):

—"plaintiff contests, for the first time, the power of a reviewing court to consider the weight of the evidence in F. E. L. A. cases and to reverse and remand a judgment as against the manifest weight of the evidence. It is contended that once such court determines that there is sufficient evidence in the record to support submitting the issues to a jury, it has exhausted its function with respect to weighing the judgment against the evidence. Numerous cases are cited and relied upon, principally, Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740; Ellis v. Union Pacific R. Co., 329 U. S. 649, 91 L. Ed. 572, 67 S. Ct. 598; Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409; Williams v. New York Cent. R. Co., 402 Ill. 494, 84 N. E. (2d) 399; Nickell v. Baltimore & O. R. Co., 347 Ill. App. 202, 106 N. E. (2d) 738. **All of these cases deal with the questions of directed verdicts or judgments notwithstanding the verdicts and not with the reversal and remandment on the ground of a verdict against**

BLEED THROUGH POOR COPY

the manifest weight of evidence." (Emphasis supplied.)

In rejecting this contention the Appellate Court said:

pp. 282-283—"The opinion of the court in the case at bar notes the fact that the evidence of an incident occurring and injury therefrom was highly contradicted, but that these issues relate to the credibility of witnesses and were decided by the jury in plaintiff's favor. **Such finding, therefore, was not disturbed.** On the issue of the existence of a defective appliance, this court did not weigh conflicting evidence, consider the credibility of the various witnesses, nor follow what it considered a more reasonable inference. It considered only **undisputed facts and circumstances. These facts were not susceptible of varying inferences but constituted a manifest weight of evidence in opposition to the claim of a defective or unsafe retriever.**

"Plaintiff has cited no authority, and we find none, which **removes the reviewing court's historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence.** The cases cited do illustrate the reluctance of the reviewing courts to disturb findings on issues that are based on credibility of witnesses. We find in these authorities, however, no such restrictive rule of law as urged by plaintiff." (Emphasis supplied.)

From the above-quoted language it is obvious that on the issue of the existence of a defective retriever the Appellate Court did not weigh "conflicting evidence, consider the credibility of the various witnesses, nor follow what it considered a more reasonable inference" but that it "considered only undisputed facts and circumstances" which "were not susceptible of varying inferences but consti-

tuted a manifest weight of evidence in opposition to the claim of a defective or unsafe retriever."

It is also significant that petitioner raised this question only after such Appellate Court had reversed and remanded for a new trial; and that in this Court, also, he has cited no authority "which removes the reviewing court's historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence."

In **Fine v. Paramount Pictures** (1950), 181 F. 2d 300, the Seventh Circuit Court of Appeals said:

> p. 302—"The purpose of a motion for a new trial is to point out to the trial court alleged errors, so that they may be corrected by that court, **and also for the purpose of furnishing a record to courts of appeals for the review of the action of the trial court.**" (Emphasis supplied.)

In **Patton v. Baltimore & O. R. Co.** (1952), 197 F. 2d 732, the Third Circuit Court of Appeals reversed the Trial Court and granted a new trial to the defendant railroad because such Trial Court had (p. 740) erroneously charged the jury in respect to the Federal Safety Appliance Act (45 U. S. C. A., Sec. 11).

In **Fairmount Glass Works v. Cub Fork Coal Co.** (1933), 287 U. S. 474, 53 S. Ct. 252, 77 L. ed. 439, this Court thoroughly discussed the authorities in reaching the conclusion that (p. 482 of 287 U. S., p. 444 of 77 L. ed.)— "Under certain circumstances the appellate court may inquire into the action of the trial court on a motion for a new trial."

In **Norfolk S. R. Co. v. Ferebee** (1915), 238 U. S. 269, 59 L. ed. 1303, 35 S. Ct. 781, this Court affirmed a judgment of

BLEED THROUGH POOR COPY

the Supreme Court of North Carolina granting a partial new trial, to assess damages only, in a suit brought under the Federal Employers' Liability Act. And in **Gasoline Products Co. v. Champlin Refining Co.** (1931), 283 U. S. 494, 75 L. ed. 1188, 51 S. Ct. 513, this Court reversed, in part, the Court of Appeals for the First Circuit and ordered a new trial of all the issues raised by the counterclaim.

In **Wilkerson v. McCarthy** (1949), 336 U. S. 53, 70, 93 L. ed. 497, 508, 69 S. Ct. 413, a directed verdict case, the concurring opinion of Mr. Justice Douglas shows that this Court has repeatedly considered lower court decisions involving the granting or refusing of new trials in Federal Employers' Liability Act cases.

III.

Federal Rule and Illinois Rule Are Same.

Finally, we invite the attention of this Court to **Jennings v. Murphy** (1952), 194 F. 2d 35, wherein the Seventh Circuit Court of Appeals, in pointing out that the Federal rule and the Illinois rule governing the appellate review of orders granting or refusing new trials were the same, said:

> p. 38—"Furthermore, granting or refusing a motion for a new trial rests within the sound discretion of the trial court and its ruling in this respect can not be disturbed on appeal in the absence of a showing of a manifest abuse of such discretion. There being, we think, absence of clear abuse of discretion, the judgment must be affirmed. Firestone Tire & Rubber Co. v. Nollman, 5 Cir., 107 F. 2d 146; Fyre v. Lyon, 55 App. D. C. 48, 299 F. 926. **The same rule abides in Illinois where this accident occurred and where the case was tried.** Couch v. Southern Railway, 294 Ill. App. 490, 14 N. E. 2d 266; Corcoran v. City of

Chicago, 373 Ill. 567, 27 N. E. 2d 451." (Emphasis supplied.)

We ask this Court to note that in the Couch case, supra, 294 Ill. A. 490, 14 N. E. (2d) 266, the very same Fourth District Appellate Court affirmed the order of the City Court of East St. Louis granting a new trial to the plaintiff in a death action brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51).

Since the Federal rule and the Illinois rule are the same, there is no point in further arguing that the granting of a new trial is a matter of procedure; and that the Illinois rule is, therefore, controlling in the case at bar.

From the foregoing authorities it is obvious that Petitioner overlooks and misapprehends the settled Federal and Illinois law in arguing that the Appellate Court did not have the power to reverse the case at bar and remand the same for a new trial; and that the case at bar presents a question of Federal substantive law.

Petitioner further focused attention on his lack of proof to show a defective retriever when he filed an affidavit in such Appellate Court stating he had no further evidence to offer on a new trial. And he also thereby recognized the power and jurisdiction of such Appellate Court, **under governing Illinois procedure**, when he moved such Appellate Court to strike that part of its judgment remanding the case at bar for new trial so that he could file his Petition for Leave to Appeal in the Illinois Supreme Court. Petitioner does not complain of the Illinois procedural law that permitted him to take this action and he could not properly do so for it is settled law that when he selected such State forum he became bound by the procedural law of Illinois (Minn. & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961, 36 S. Ct. 595; Parthun v. Elgin, J. & E.

BLEED THROUGH POOR COPY

Ry. Co. [1st, 1945], 325 Ill. App. 408, 411, 60 N. E. [2d] 464, appeal denied 326 Ill. App. xv).

Petitioner again admitted Illinois procedural law governs the case at bar when he contended in the Appellate Court that Rule 35, Fed. Rules Civ. Procedure, permitting physical examination of a plaintiff, did not apply in the case at bar and that Illinois law controlled. In sustaining his then contention the Appellate Court said (p. 280 of 351 Ill. App.): "The granting to state courts of concurrent jurisdiction in F. E. L. A. cases does not require that a federal rule supplant the procedural law of a State." Petitioner's present contention that Federal procedural law controls the case at bar indicates that his legal reasoning changes as his needs require.

IV.

This Court Should Not Review the Findings of Fact Made by the Appellate Court.

The Petitioner, without any citation of authority, devotes the latter part of his Argument (His Pet. 19-22) to arguing that this Court should review the findings of fact made by the Appellate Court, in the event it finds that such Court had the authority to hold the jury verdict herein against the manifest weight of the evidence. In making such argument he (His Pet. 20-21) gives an incomplete and inaccurate version of his testimony and the testimony of his expert witness Paul Kline and the attention of this Court is invited to pages 74, 75, 85 of the Record herein and to pages 278, 279 of 351 Ill. App.

However, Section 92 (3) (b) of the Illinois Civil Practice Act * (Ill. Rev. Stat. 1953, ch. 110, par. 216) specifically provides that the findings of fact of the Appellate Court

* See page 4 of this Brief for quotation of this statute.

on the weight of the evidence, in law actions, shall be final and binding on the Illinois Supreme Court and such Court has squarely held that in law actions brought to it by appeal from the Appellate Court it "is restricted to re-examination as to questions of law only" (**Mabee v. Sutliff & Case Co.**, 404 Ill. 27, 32). (Accord: **Olson v. Chicago Transit Authority** [1953], 1 Ill. 2d 83, 89, 115 N. E. [2d] 301.)

Rule 38, paragraph 5 (a), of this Court states that the character of its reason for granting certiorari to state courts is "Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this court." The above Illinois statute certainly does not present "a federal question" calling for the exercise of the discretion of this Court, even though this Court should be of the opinion that it is not bound by said Illinois statute and has powers of review not possessed by the Illinois Supreme Court (Chrisman v. Miller, 197 U. S. 313, 319, 49 L. Ed. 770, 772, 25 S. Ct. 468; Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 474, 70 L. Ed. 1041, 1044, 46 S. Ct. 564).

And in the concurring opinion of Mr. Justice Douglas in **Wilkerson v. McCarthy** (1949), 336 U. S. 53, 70, 71, 93 L. Ed. 497, 509, it is said that "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected."

It is respectfully submitted that the Appellate Court, in reversing and remanding this cause for a new trial before another jury, fully respected such "jury function"; that by petitioners' own affirmative acts he has admitted the procedural law of Illinois applied and does not question its application; and that this court should, therefore, deny certiorari in this cause.

CONCLUSION.

For the reasons urged in this Brief it is respectfully submitted that said petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE D. BURROUGHS,
Bank of Edwardsville Building,
Edwardsville, Illinois,

FRED P. SCHUMAN,
1308a Niedringhaus Avenue,
Granite City, Illinois,

GORDON BURROUGHS,
Bank of Edwardsville Building,
Edwardsville, Illinois,

BURROUGHS, SIMPSON & BURROUGHS,
Bank of Edwardsville Building,
Edwardsville, Illinois,

Attorneys for Respondent.

HAROLD G. TALLEY,
214a West Third Street,
Alton, Illinois,
Of Counsel.